

BAR COUNSEL INSIDER



Fee Agreement Terminology

Bar Counsel Insider provides practical and important information to State Bar members about ethics and the disciplinary process.

Retainer, contingent, flat, hourly, advance, earned, unearned. Who else but attorneys could come up with so many terms to describe one thing: money.

As attorneys, we have many choices on how our clients (hopefully) pay us for our labors. However, these options may create confusion as to what you actually mean when you draft a fee agreement with your client. To prevent such confusion and to comply with the rules, it's important to understand the differences between these types of fees when deciding to list one in your agreement.

Fees come in two basic varieties: earned and unearned. Earned fees are just that: You've earned them, and you can take them or put them in your general account. Unearned fees are for work you haven't completed yet. These fees must go in your trust account. Just remember, if you term a fee as "nonrefundable" or "earned upon receipt," then ER 1.5(d)(3) requires you to include certain disclaimers in your agreement.

We're all familiar with the most common type of earned fee, a **contingency fee**. By definition, when the contingency fee is taken out of the settlement, the work has been completed and the fee earned. On the other hand, the next type of earned fee is possibly the most erroneously used term of all time.

A **retainer** is an option on a lawyer's time. It is a fee a client pays just for the privilege of possibly hiring you in the future. It requires no actual work on the lawyer's part and is merely a fee paid for the lawyer to make sure he is available in the future. A retainer is therefore earned upon receipt. If you are billing against the amount paid to you, that is not a retainer, it is an advance fee.

An **advance fee** is a sum paid to the lawyer for him to bill against as it is earned. Advance fees are unearned when paid, and are usually billed against on an hourly basis. As the work is completed and the advance fee is billed against, those amounts billed become earned and can be properly transferred to your general account.

Finally, another familiar fee, the **flat fee**, can be either an unearned type of advance fee or an earned fee when paid. For a flat fee to be earned when paid, it is important that your fee agreement term it as "earned upon receipt" and contain the proper ER 1.5(d)(3) disclaimers. Otherwise, even though it is a flat fee, it is unearned and must go in the lawyer trust account *until you have completed the work contracted for*. It is only at that point that the flat fee would become earned and could be transferred to the general operating account.

Although fee agreement terminology might not be the most pressing matter in your practice, a little effort in reviewing your fee agreements and using the proper terminology can go a long way in preventing angry clients and troublesome bar complaints.

Contact the State Bar's Ethics Hotline at (602) 340-7284.

—continued on p. 44

ETHICS OPINIONS

Opinion No. 07-03 (November 2007)

While modern electronic communications are often greatly beneficial to the client, lawyers who use them to send or receive documents or other communications on behalf of clients must be aware that they carry certain risks. Lawyers must take reasonable precautions to prevent inadvertent disclosure of confidential information.

Except in the specific circumstances described in this opinion, a lawyer who receives an electronic communication may not examine it for the purpose of discovering the metadata embedded in it.

Opinion No. 07-04 (November 2007)

The representation of multiple clients in a single litigation matter is generally permissible so long as the lawyer reasonably believes that he or she will be able to provide competent and diligent representation to each client, the representation does not involve the assertion of a claim by one client against another client, and each client gives informed consent, confirmed in writing. Ethical Rule 1.7(b). The requirement of informed consent arises only if, as an initial matter, the lawyer determines that the lawyer can, in fact, competently and diligently represent each client in the particular matter. Once that determination is made, the lawyer bears the burden of showing that there was adequate disclosure to each client and that each client gave an informed consent.

The disclosures required to obtain the client's "informed consent" will depend on the facts and circumstances of the particular matter. The lawyer must explain the possible effects of the common representation on the lawyer's obligations of loyalty, confidentiality and the attorney-client privilege. In addition to the confirming writing required by ER 1.7(b), informed consent usually will require that the lawyer explain the advantages and disadvantages of the common representation in sufficient detail so that each client can understand why separate counsel may be desirable. Finally, during the course of the matter, the lawyer must continue to evaluate whether conflicts have arisen that may require additional disclosures and consent or withdrawal from the representation.

Need an Opinion? Check out the State Bar Web site at www.myazbar.org/Ethics for a listing of the ethics opinions issued between 1985 and 2007, as well as Arizona's Rules of Professional Conduct.

If you are an Arizona attorney and have an ethics question, call our ethics counsel, Patricia A. Sallen, at the ethics hotline: (602) 340-7284.